CITATION: Cavanaugh v. Grenville Christian College, 2011 ONSC2995
COURT FILE NO.: 08-CV-347100CP
DATE: May 23, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger and Tim Blacklock

Plaintiffs

- and -

Grenville Christian College, The Incorporated Synod of the Diocese of Ontario, Charles Farnsworth, Betty Farnsworth, Judy Hay the Executrix for the Estate of J. Alastair Haig, and Mary Haig.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- Russell M. Raikes, Loretta Merritt, and Christopher J. Haber for the Plaintiffs
- Geoffrey D.E. Adair and Alexa Sulzenko for the Defendants, Grenville Christian College, Charles Farnsworth, and J. Alastair Haig
- Stephen Stieber and Linda C. Phillips-Smith for the Defendant the Incorporated Synod of the Diocese of Ontario

HEARING DATES: April 30, May 1, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiffs, Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger, and Tim Blacklock move for certification of this action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

[2] For 24 years, between 1973 and 1997, the Plaintiffs, and the Class Members they would represent, were students at Grenville Christian College, a private school in Brockville, Ontario. In their proposed class action, the Plaintiffs allege that the residential students at the school were physically and psychologically abused. They allege that the abuse was systemic negligence and systemic breach of fiduciary duty. The Plaintiffs claims damages of $200 million.

[3] The Plaintiffs sue Grenville Christian College, the Incorporated Synod of the Diocese of Ontario ("the Diocese"), an Anglican synod, Charles Farnsworth ("Father Farnsworth"), a headmaster of the school, and the estate of J. Alastair Haig, ("Father Haig"), another headmaster, for negligence, assault, battery, intentional infliction of mental suffering, and breach of fiduciary duty.

[4] All the Defendants submit that certification should be denied because: (1) the proposed questions want for commonality; (2) a class proceeding is not the preferable procedure; and (3) the litigation plan is unworkable. Additionally, The Diocese submits that the action should be dismissed against it, because the statement of claim does not disclose a reasonable cause of action.

[5] I agree that the action should be dismissed against the Diocese, and I agree with the submission of the Defendants that a class proceeding is not the preferable procedure, and for that reason alone I dismiss the certification motion. A class action is a means for access to justice, but it is not the only means to achieve access to justice, and, in my opinion, there is a preferable way for the former Grenville students to pursue justice.

[6] Although the Plaintiffs have serious claims that should be tried, I deny certification motion without regrets, because I would exercise the Court's power under sections 7, 12, and 29 (1) of the *Class Proceedings Act, 1992,* to allow the action to continue with a different litigation plan that is procedurally fair to the Defendants and that should provide the access to justice, behaviour modification, and judicial economy that are the goals of the Act. The new litigation plan shall be determined by case conference or, if necessary, by motion.

[7] In these Reasons for Decision, I will provide some suggestions for the parties for a new litigation plan based on my experience from *Hudson v. Dr. Richard Austin,* 2010 ONSC 2789, where a proposed class action by 99 patients of an alleged negligent gynaecologist became 99 simultaneously case-managed actions.

B. ORGANIZATION OF THE REASONS FOR DECISION

[8] I shall organize these Reasons for Decision under the following headings:

- Introduction
- Organization of the Reasons for Decision
- Factual Background
- General Background Facts
- The Representative Plaintiffs
    - Margaret Elizabeth Granger
    - Lisa Cavanaugh
    - Tim Blacklock
    - Richard Haydon Van Dusen
    - Andrew Hale-Byrne
- Procedural Background
- Certification
    - Introduction

- Cause of Action
  - The Claims in Negligence and Breach of Fiduciary Duty
  - The Claims against Grenville Christian College and Fathers Haig and Farnsworth
  - The Claim against the Diocese in Negligence
  - The Vicarious Liability Claim against the Diocese
  - The Claim against the Diocese for Breach of Fiduciary Duty
  - Conclusion – Cause of Action Criterion
- Identifiable Class
- Common Issues
- Preferable Procedure
- Representative Plaintiff

- Refusal to Certify – Continuing Action in Altered Form
- Conclusion

C. FACTUAL BACKGROUND

1. General Background Facts

[9] The Defendant, Grenville Christian College was a non-share corporation (Ontario Corporation No. 226937) incorporated on August 29, 1969. It was originally named the Berean Christian School and changed its name in about 1973.

[10] Grenville Christian College, which is now closed, was a private school for day students and boarding students in the higher grades. Its campus consisted of two parcels of land separated by Highway #2, one parcel being approximately 10 acres adjacent to the St. Lawrence River and the other a 240-acre main campus. The school offered classes from Junior Kindergarten to Grade 13 in a central large four-storey limestone building that housed reception and administrative offices, classrooms, study halls, kitchen, and dining facilities. There were student dormitories, staff apartments, and the headmaster's home. There were ancillary buildings, playing fields, a farm, and a tract of undeveloped property.

[11] There was a consecrated chapel on the school's site, where the religious services were based on the Anglican prayer book and hymnals.

[12] The school had a good reputation because of the academic prowess of its graduates and for offering numerous extracurricular activities. Grenville Christian College students enjoyed a high rate of admission to colleges and universities with approximately 98% of its graduates moving on to post-secondary education.

[13] Grenville Christian College had no Board of Directors. It had, at various times, a Board of Patrons or a Board of Advisors who agreed to lend their names to support fundraising efforts. The patrons or advisors included various business people, government officials, and other dignitaries, such as Trevor Exton, John Black Aird and Pauline McGibbon (both former Lieutenant Governors of Ontario), Jean Casselman Wadds (a former ambassador), and the Right Reverend Allan Read, a former Bishop of Ontario.

[14] The late J. Alistair Haig, who was married to Marg Haig, and Charles Farnsworth, who was married to Betty Farnsworth, were officers and directors of Grenville Christian College. Fathers Haig and Farnsworth acted as co-headmasters of the school from 1973 to 1983, when Father Haig left the school. Father Farnsworth was headmaster until July 1997.

[15] Father Farnsworth was born in South Carolina. He was a member of the Berean Fellowship in Dallas and was a Pentecostal Assembly minister. He attended but did not graduate from the University of Georgia. He had been a pastor of a church in Atlanta, Georgia, called the "New Testament Church", a church of the Pentecostal Assembly. In about 1965, he moved to Texas to join the Berean Christian School in Dallas. He became one of the pastors and a teacher at the school. In 1968, he founded the Berean Christian School in Long Island, New York. Subsequently, he went to Grenville Christian College and became co-headmaster with Father Haig.

[16] Father Haig was an ordained United Church minister and had been involved in different schools as a teacher and was a pastor in churches in the United States. He had been a teacher and administrator at Albert's College before coming to Grenville Christian College. He also was a teacher and administrator at Stoney Brook, a Berean Christian school in Long Island, New York, which he left to form Grenville Christian College with Farnsworth.

[17] Fathers Haig and Farnsworth and some of the staff of the school were members of the Community of Jesus, a Christian organization based in Orleans, Massachusetts, U.S. The Plaintiffs describe the Community of Jesus as a religious cult. The Plaintiffs' evidence depicts the teachings, beliefs, and practices of the Community of Jesus, which allegedly were enthusiastically adopted by the staff of Grenville Christian College, to be fanatical, obsessive, intolerant, sexist, condescending, chauvinistic, censorious, misogynistic, and homophobic.

[18] Grenville Christian College represented itself as an Anglican private school, but it did not represent itself as being officially part of the Anglican Church. The school never represented itself to be administered by the Diocese. Students who attended the school came from many denominations and religions. No one was required to be Anglican to attend the school.

[19] The Diocese is responsible for the administration of the Anglican churches around Brockville, Ontario. It is responsible for the general activities of Anglicans or Anglican priests who are assigned to a parish. Grenville Christian College was not an Anglican church, and it was not a parish. The Diocese did not own, fund, manage, operate, or administer the school.

[20] The Bishop of the Diocese, who is autonomous from the Diocese, ordained Fathers Haig and Farnsworth as Anglican clergy on September 29, 1977. The ordination did not empower the Diocese to administer Grenville Christian College and Fathers Haig and Farnsworth were never employed by the Diocese. At the time of the ordination, Fathers Haig and Farnsworth were already clergy of other Christian denominations and had been the academic and spiritual leaders of the school for over nine years.

2. The Representative Plaintiffs

[21] At Grenville Christian College, elementary school students were day students. Secondary students boarded at the school in dormitories. Ms. Granger, who was a staff kid, resided at the school between 1970 and 2001. Mr. Blacklock resided at Grenville Christian College between 1976 and 1977. Mr. Van Dusen resided at the school between 1979 and 1981. Mrs. Cavanaugh resided at the school between 1987 and 1989. Mr. Hale-Byrne resided at the school between 1988 and 1990.

[22] All the Plaintiffs were residential students during the class period. They all allege that the school was a place of fear, intimidation, and arbitrary punishment. They all complain of intentional infliction of mental suffering in a variety of ways including demeaning punishments, ostracism, and interrogation ("light sessions"). Three students complained of assaults with a paddle. One Plaintiff had hearsay evidence of two incidents of sexual abuse of other students at the school. One Plaintiff alleged a failure to accommodate his learning disabilities (dyslexia), and they all allege that Grenville Christian College failed to teach Anglican values and rather indoctrinated the students in the fanatical teachings of the Community of Jesus. The Plaintiffs say that what took place at the school was motivated by "a systemic campaign by the Defendants, Fathers Haig and Farnsworth and the School, to promote and indoctrinate students in the teachings and practices of the Community of Jesus."

[23] All of the Plaintiffs were cross-examined on their affidavits. The Defendants submit that the cross-examinations reveal that the Plaintiffs' evidence to be inadmissible hearsay or to be false, inconsistent, unreliable, exaggerated, hyperbolic, aggressive, and unbelievable. The Defendants submit that the Plaintiffs, some of whom had troubled pasts before they came to the school, are not credible witnesses of the events they reported and that their evidence ought not to be believed.

[24] Thus, the Defendants submit that there is no factual support for the Plaintiffs' allegations of sexual abuse at Grenville Christian College. None of the Plaintiffs suffered sexual abuse, and the allegations are hearsay evidence from two or three students via third hand reports.

[25] A certification motion is not the time to make findings of credibility, and for the purposes of the certification motion and with an exception for the case against the Diocese, I accept the Plaintiffs' evidence as some basis in fact for the certification criteria, discussed later in these Reasons for Decision, as against Grenville Christian College and Fathers Haig and Farnsworth.

[26] The Plaintiffs' evidence, however, does not provide some basis in fact for satisfying the certification criteria as against the Diocese; rather, the Plaintiffs' evidence, along with the Defendants' evidence, shows that the certification criteria have not been satisfied as against the Diocese.

(a) Margaret Elizabeth Granger

[27] Margaret Elizabeth Granger, neé Gillis, was born in April 1970. She was a staff kid. Her parents, Patricia and Malcolm Gillis, were teachers at Grenville Christian College. Mrs. Granger resided at the school until 2001. She was a student for elementary and secondary school, and she lived in residence for around two years. Mrs. Granger and her parents lived at the school, although not together as a family, because staff children were required to live with other staff and were frequently reassigned to different families.

[28] Mrs. Granger deposed that all of the staff were members or were required to become members of the Community of Jesus, which was led by Mother Cay and Mother Judy, who visited the school on average once or twice a year. Mrs. Granger alleges that the teachings and practices of the Community of Jesus were the predominant influence on the operation of the school. She deposed that the prevailing atmosphere at the school was one of fear, bullying, intimidation, and humiliation. Students were constantly being watched for sinning and were instructed to expose each others' sins, even where there was no obvious conduct on which to base those sins. Obedience to the teachings of the Community of Jesus was a dominant objective.

[29] Mrs. Granger deposed that "light sessions" were employed as a means of discipline, and these sessions were an integral part of the practices and culture of the school. A light session was a public assembly or a private meeting at which a student or a group of students would be surrounded by staff members, who would aggressively berate the students and accuse them of sin, often the sins of supposedly evil thoughts. Mrs. Granger was subjected to a light session in the middle of the night for about four hours. She observed other light sessions of other students. Mrs. Granger says that the students were taught to be ashamed of any sexual thoughts. Physical attractiveness was regarded as sinful and as wanton promiscuity. According to Mrs. Granger, if a student was sick or had a medical condition, he or she was told that it was because of sin. Students were told that they didn't need the medicine if they lived a pure life.

[30] Mrs. Granger deposed that in addition to light sessions, it was quite common for students to be disciplined by forced labour that required carrying out unpleasant and demeaning tasks, including cleaning out a dumpster, scraping floors to remove wax, shovelling snow, and cleaning toilets. Discipline also included enforced silence and ostracism for days or weeks. Once Mrs. Granger was on discipline for 29 straight days. Another time, she received corporal punishment with a wood paddle.

[31] In the Statement of Claim and in her affidavit, Mrs. Granger alleges that she was: subjected to light sessions; intimidated and bullied; sent to the Community of Jesus; subjected to various punishments, including forced labour and enforced silence; required to witness the punishment and humiliation of other students; required to attend lectures in which women were demeaned and degraded; and kept apart from her parents.

(b) Lisa Cavanaugh

[32] Lisa Cavanaugh began attending the school in 1984 in grade six. She was a student for five years, the last two in high school as a resident student.

[33] Ms. Cavanaugh said that the students of the school were subject to a constant barrage of psychological and emotional abuse and sometimes to physical abuse. She was subjected to three light sessions where she was accused of being corrupted by sin. She found these sessions intensely frightening. It was Ms. Cavanaugh's belief that the primary goal of the school was to break down the will and spirit of the students in order to coerce them to accept the teachings of the Community of Jesus.

[34] In the Statement of Claim and in her affidavit, Ms. Cavanaugh alleges that she was: subjected to light sessions; called derogatory and sexist names; required to watch other students being punished and humiliated; subjected to unnecessary and inappropriate searches; not permitted to have male friends; and required to participate in lectures in which women were demeaned and degraded and unhealthy and inappropriate attitudes toward sex were promoted.

(c) Tim Blacklock

[35] Tim Blacklock was born in May 1961, and he grew up in Kingston, Ontario. In 1976, his parents enrolled him in Grade 9 at Grenville Christian College, where he boarded until the spring of 1977. He was very unhappy at the school, and he attempted to persuade his father to remove him. When these efforts failed, he devised an unfortunate plan to be expelled for smoking. He was not expelled, but rather he alleges that he was brutally punished and beaten with a wooden paddle wielded by Father Farnsworth. On another occasion, he fought off another beating after he had been caught after running away. He attempted to run away several more times.

[36] Mr. Blacklock deposed that he witnessed other students being punished. He remembers several incidents of public humiliations of students at light sessions, where students were harassed until they confessed sins. He was the subject of light sessions on two-consecutive nights. Mr. Blacklock deposed that as a result of his experience at Grenville, he felt betrayed by his parents. He lost all interest in education and left home at the age of seventeen. He lost trust for people in positions of authority, including priests or ministers of any kind.

[37] In the Statement of Claim and in his affidavit, Mr. Blacklock alleges that he was: beaten with a wooden paddle; subjected to excessive punishments; subjected to light sessions; required to witness the punishments and humiliation of other students, and cut-off from communicating with others.

(d) Richard Haydon Van Dusen

[38] Richard Haydon Van Dusen was born in October 1961, and his parents, who resided outside of Canada, enrolled him at Grenville Christian College for grades 12 and 13. He found the environment at the school strange and oppressive. He said that for

religious services, students were encouraged to speak in tongues and to invite the presence of the Lord into their bodies. He recalls occasions when Father Farnsworth or Father Haig placed the entire school in complete silence during meals.

[39] Once after returning to the school after visiting his Canadian relatives, he was taken out of class by two teachers and brought into an office on the ground floor of the school. The two teachers placed their hands on him and prayed for God to enter. He was asked to confess. One of the teachers brutally beat him with a wooden paddle. He was further punished by being responsible for cleaning the pots. He was not allowed to talk during the day for any reason, except when asked a question from a Grenville staff member.

[40] In the Statement of Claim and in his affidavit, Mr. Van Dusen alleges that he was: subjected to light sessions; beaten with a wooden paddle; subjected to various forms of punishment, including enforced silence; required to witness the punishments and humiliation of other students; cut-off from communication with others; and subjected to regular monitoring and surveillance.

(e) Andrew Hale-Byrne

[41] Andrew Hale-Byrne was born in June 1971, and he attended grades 11 and 12 at Grenville Christian College. He suffered from a learning disability, and he says that before he enrolled he was told that the school would accommodate him. After his enrollment, however, he was not accommodated. His experience at the school was traumatic.

[42] The following two paragraphs from his affidavit is indicative of how Mr. Hale-Byrne experienced his days at the school:

> Student life at Grenville Christian College was far from idyllic. In fact, the atmosphere in the school was one of fear, isolation, intimidation, abuse, and mind-control. It was like waking up in a horror film. The school was operated as a mind-control cult along the lines of Nazi Gleishaltung, and practices common to other totalitarian regimes, which I later studied at university. Jacqueline Thomas, Grenville alum, recently told me that it was whilst she was photographing the Khmer Rouge War Crimes Trials in Cambodia she was able to see the parallels between the practices of that totalitarian regime and those at Grenville. Former staff I have spoken to have compared the practices at Grenville to those of the Maoist and Soviet Regimes. Former Grenville English teacher, Mr. Bob Irving, confirmed to me that it was whilst he was reading the book "Animal Farm", by George Orwell at Grenville that the parallels with totalitarian regimes dawned on him. The staff engaged in savage attacks in psychological warfare. Indeed, I suffered degrading and inhumane treatment whilst at Grenville.
>
> I was then light sessioned and "disciplined" over the next two days. I was sent outside with buckets, which I had to fill with certain sized rocks pulled out of the ground with my bare hands even though it was cold and my fingers were bleeding from doing so. This was not the only time I was disciplined in this manner. While I was pulling the rocks from the ground, staff stood over me screaming insults as I was kneeling in the dirt. When that task was finished and the buckets were filled, I was brought back inside for another private light session where I was screamed at. I was then taken either back outside to dig more rocks, whilst people stood over me screaming abuse, or to the back of the kitchen where I was

> required to clean the inside of a dumpster behind the school with a toothbrush. After that job was done, I was taken to the kitchen where I had to assist in preparing meals.

[43] In the Statement of Claim and in his affidavit, Mr. Hale-Byrne alleges that he was: physically assaulted; subjected to light sessions; ridiculed, punished and provided with no support for his dyslexia; subjected to an exorcism; subjected to various forms of punishment including sleep deprivation, enforced silence, and forced labour; subjected to inappropriate and unnecessary searches; cut-off from communication with others; and, forced to participate in lectures related to the teachings of the Community of Jesus.

3. The Defendants' Witnesses

[44] Twelve individuals, including nine former resident students at Grenville Christine College swore affidavits rebutting the evidence of the Plaintiffs and attesting to the positive qualities of the school. They categorically denied the Plaintiffs' litany of damning allegations against the school.

[45] The witnesses who gave evidence for the Defendants were: (a) Rev. Byron Gilmore (1977-1982), Anglican priest; Rector Christ Church, Brampton; (b) William Newell (1979-1981), owner commercial real estate business, Brockville; (c) Annie Glynn (1980-1981), executive, Zigman Metals, Prescott, Ontario; (d) Dr. Rudy Reindl (1982-1987), orthopaedic surgeon; assistant professor, McGill University School of Medicine; (e) Dr. Simon Best (1984-1998), fellow Harvard Medical School; (f) Robert Creighton (1984-1987), broadway actor; (g) David Webb (1984-1987), director of alpine programs at Sir Sam's, Halliburton, Ontario; (h) Maureen Graham (1985-1987), executive with Tony Graham Lexus Toyota; (i) Katie Lee (1992-1996), executive with Luxury Motorhomes, Ottawa.

[46] The evidence of these former students of Grenville Christian College was remarkably different than the evidence of the Plaintiffs, and these deponents were very favourable to Fathers Haig and Farnsworth and Grenville Christian College.

[47] The former students acknowledged the existence of a strict discipline regime, and admitted that the staff confronted the students over a wide variety of student conduct ranging from breaches of rules to negative attitudes. The former students denied, however, any notion of abusive conduct, and they regarded the staff as caring and their own experience at Grenville as happy and productive.

[48] The Defendants' witnesses praised the school.

[49] For examples, Mr. Webb deposed that: "Throughout my time at GCC, I felt that the staff and the school as a whole had the kindest and most caring spirit imaginable. The staff wanted the best for the students and wanted them to develop and do things they would have felt unable to do." Rev. Byron Gilmore deposed that: "I believe that the school was God's conduit of grace into my life, and I will be eternally thankful to GCC." Dr. Best deposed that: "I found my time at GCC to be a very positive academic and social experience." Mr. Newell deposed that: "GCC had an enormously positive impact on my life. It instilled in me values, morals and a strong work ethic, and any shortcomings or problems I have experienced in life are my fault, not the fault of GCC."

Ms. Graham deposed that: "The school instilled in me an excellent work ethic that has served me well throughout my life, and I believe it gave me character and helped me become who I am today."

4. The Incorporated Synod of the Diocese of Ontario

[50] The school was founded independently of the Diocese. There is no evidence to suggest that Grenville Christian College ever represented that it was officially affiliated with the Diocese. There is no evidence that the Diocese ever advised any class member or their parents that the school was, in any way, affiliated or related to the Diocese.

[51] Various Bishops of the Diocese attended at ceremonial functions at the school, such as Christmas or graduation, to officiate or observe. Clergy from other denominations and other dignitaries also attended.

[52] There is no evidence that the Diocese had an employer-employee or joint venture relationship with the school or with Fathers Haig and Farnsworth.

[53] There is no evidence of any direct involvement by the Diocese at the school in the various abuses, nor even having received complaints of abuse at any material time.

D. PROCEDURAL BACKGROUND

[54] The Plaintiffs commenced a proposed class action on January 15, 2008.

[55] The Defendants, excepting the Diocese and Mary Haig, brought a motion to strike various allegations contained in the Amended Statement of Claim. They were ultimately successful in part. See *Cavanaugh v. Grenville Christian College*, [2009] O.J. No. 875 (S.C.J.), varied [2009] O.J. No. 4502 (C.A.).

[56] The Defendants raised no objection to the Amended Amended Statement of Claim and delivered Statements of Defence.

[57] The Plaintiffs have received funding from the Class Proceedings Fund.

[58] The action was recently discontinued as against the Defendants, Betty Farnsworth and Mary Haig. See *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2398.

E. CERTIFICATION

1. Introduction

[59] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[60] For an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[61] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[62] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26-29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 15 and 16.

[63] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 28-29.

2. Cause of Action

(a) Introduction

[64] The first criterion for certification is whether the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5 (1)(a) of the *Class Proceedings Act, 1992*: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[65] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4^{th}) 257 (Ont. C.A.). Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc., supra,* and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[66] The law must be allowed to evolve and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal

to the Supreme Court of Canada refused (1982), 35 O.R. (2d) 64n. However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

[67] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9.

(b) <u>The Claims in Negligence and for Breach of Fiduciary Duty</u>

[68] The Plaintiffs' pleading of negligence is set out in paragraphs 32 to 35 of their Amended Amended Statement of Claim, which state:

> 32. The Plaintiffs state that, at all material times, the Defendants owed a duty of care to the Plaintiffs during their attendance at the school.
>
> 33. The Plaintiffs state that the Defendants were negligent in the care of the students; in particular, the Plaintiffs state that:
>
> (a) The Defendants failed to have in place systems for the protection of Students from sexual, physical, psychological, emotional or spiritual abuse;
>
> (b) The Defendants failed to provide adequate or appropriate supervision of Students;
>
> (c) The Defendants failed to respond to complaints made by staff and/or Students regarding the mistreatment of Students;
>
> (d) The Defendants failed to have a system by which Student complaints and concerns could be addressed;
>
> (e) The Defendants hired unqualified and incompetent staff;
>
> (f) The Defendants failed to properly supervise and train staff responsible for the care and education of Students attending the school;
>
> (g) The Defendants imposed demeaning and brutal tasks known as "discipline" or, in the case of female students known as "cold grits" for perceived sins;
>
> (h) The Defendants failed to have in place appropriate systems and safeguards for Students who had medical conditions which required accommodation or monitoring;
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> (i) The Defendants failed to provide appropriate sex education;
>
> (j) The Defendants confronted students and verbally abused Students if they displayed any conduct that was perceived as homosexual in nature;

> (k) The Defendant, Diocese, failed to undertake adequate investigation into the background of Fathers Haig and Farnsworth;
>
> (l) The Defendant, Diocese, failed to provide adequate education, training and supervision of Fathers Haig and Farnsworth;
>
> (m) The Defendant, Diocese, failed to ensure that the teachings and practices of the school promoted the Anglican faith and values.
>
> 34. The Plaintiffs state that the conduct of the Defendants aforesaid was calculated to produce harm and did, in fact, produce physical, emotional, psychological and spiritual harm to the members of the Student Class and Staff Student Class.
>
> 35. The Plaintiffs state that the corporate Defendant, Grenville Christian College, is responsible in law for the conduct of its Officers, Directors, Employees, Servants and Agents more particularly described above.

[69] It may be noted that of the particulars of negligence, most of the allegations can only refer to the Defendants, Grenville Christian College and Fathers Haig and Farnsworth, who operated and controlled the school, and that the particulars of negligence directed specifically at the Diocese are found in paragraphs 33 (k), (l), and (m) and concern failures to supervise Fathers Haig and Farnsworth.

[70] The Plaintiffs' pleading of breach of fiduciary duty is set out in paragraphs 27 to 31 of the Amended Amended Statement of Claim, which state:

> 27. The Plaintiffs state that, at all material times, the children who attended the school were entirely within the power and control of the Defendants, and were subject to the unilateral exercise of the Defendants' power or discretion.
>
> 28. The Plaintiffs state that by virtue of the relationship between the children and the Defendants, being one of trust, reliance and dependence, by the children, the Defendants owed a fiduciary obligation to the Plaintiffs consistent with the obligations of a parent or guardian to a child under his or her care and control and consistent with the obligations of a priest to a minor parishioner.
>
> 29. The Plaintiffs state that the Defendants breached their fiduciary obligations owed to the Plaintiffs; in particular,
>
> (a) The Defendants promoted values which were fundamentally different from those of the Anglican faith;
>
> (b) The Defendants tried to indoctrinate the Students in values which were fundamentally different than the Anglican faith;
>
> (c) The Defendants imposed exorcisms and "light sessions" during which Students were forced to confess sins, real or imagined, as the individual Defendants and other staff members challenged and/or screamed at the Students;
>
> (d) Students were required to watch staff be subjected to the humiliation of light sessions;
>
> (e) Students were compelled to confess imagined sins and to betray other Students;
>
> (f) The Defendants imposed a system of excessive, abusive and inappropriate punishments;

(g) The Defendants imposed punishments on Students without justification;

(h) The Defendants physically intimidated the Plaintiffs;

(i) The Defendants fostered an atmosphere of fear, intimidation, anxiety and suspicion.

(j) The Defendants imposed a system of humiliation and degradation of Students;

(k) The Defendants threatened punishment to Students for any disclosure of the activities of the school to parents and family members;

(l) The Defendants deprived Students of communication with family;

(m) The Defendants engaged in practices which were intended to and did physically, psychologically, emotionally and spiritually damage the Plaintiffs;

(n) The Defendants preferred their own financial interests to those of the physical, emotional and psychological needs of the Students for whom they were responsible.

30. Further, the Plaintiffs state that the conduct of the Defendants as set out in this pleading was part of a systemic campaign by the Defendants, Fathers Haig and Farnsworth and the School, to promote and indoctrinate Students in the teachings and practices of the Community of Jesus.

31. Further, or in the alternative, the Plaintiffs state that the conduct set out in the preceding paragraphs amounts to the intentional infliction of mental suffering on the Plaintiff Class.

[71] It may be noted once again that most of the allegations of breach of fiduciary duty can only refer to the Defendants, Grenville Christian College and Fathers Haig and Farnsworth, who were the actors of the misdeeds at the school, and cannot refer to the Diocese which did not own, operate, control, or have a right to supervise the administration of the school. Thus, it was the school and not the Diocese that indoctrinated, imposed exorcisms, compelled confessions, imposed punishments, etc.

[72] It is also worth noting for the discussion that follows that many, if not most of the allegations against the Defendants, are allegations of non-feasance; i.e. of the failure to act or to respond. It is also important to note the emphasis on systemic wrongdoing. Thus, there are allegations of having a system of excessive punishments, having a system of humiliation, failing to have a system to protect against abuses, fostering an atmosphere of fear, indoctrinating, failing to have a system to handle complaints, censoring, failing to have a system to monitor medical conditions, and having a systemic campaign to physically, psychologically, emotionally, and spiritually damage the students.

[73] Thus, the Plaintiffs plead that the Defendants, Grenville Christian College and Fathers Haig and Farnsworth (but not the Diocese) conducted a systemic campaign to promote and indoctrinate Students in the teachings and practices of the Community of Jesus. The essential allegation against the Diocese is that they failed to intervene to ensure that Grenville Christian College promoted the teachings, practices, and values of the Anglican faith.

(c) The Claims against Grenville Christian College and Fathers Haig and Farnsworth

[74] The Defendants, Grenville Christian College and Fathers Haig and Farnsworth do not dispute that the first criterion for certification is satisfied.

(d) The Claim against the Diocese in Negligence

[75] The elements of a claim in negligence are: (1) the defendant owes the plaintiff, a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law: *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R 114 at para. 3.

[76] The first element of a tort claim for negligence is a duty of care. As Lord Esher stated in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

[77] In the case at bar, the Diocese submits that it owed no duty of care to the Plaintiffs.

[78] The contemporary Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada's decisions adapting the House of Lord's decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). See: *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Odhavji Estate v. Woodh*ouse, [2003] 3 S.C.R. 263; *Childs v. Desormeux*, [2006] 1 S.C.R. 643; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83; *Mustapha v. Culligan of Canada Ltd., supra* and *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737.

[79] The contemporary analysis of whether a duty of care exists begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new category of claim. If the claim falls within an established category, then precedent will have established that there is a duty of care associated with the relationship between the parties: *Childs v. Desormeaux*, *supra* at para. 14.

[80] If the case does not come within an established category, it is necessary to undertake a duty of care analysis. In *Anns v. Merton London Borough Council*, *supra*, the House of Lords adopted a two-step analysis to determining whether there was a duty of care between a plaintiff and a defendant: (1) Is there a sufficiently close relationship between the plaintiff and the defendant such that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff? and, (2) Are there any considerations that ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owned; or (c) the damages to which a breach of it may give rise.

[81] As developed by the case law in Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying three requirements: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeabilty and proximity. Thus, whether a relationship giving rise to a duty of care exists depends on foreseeability moderated by policy concerns: *Anns v. Merton London Borough Council, supra*; *Mustapha v. Culligan of Canada Ltd., supra,* at para. 4.

[82] Proximity focuses on the type of relationship between the plaintiff and defendant and asks whether this relationship is so close that the defendant may reasonably be said to owe the plaintiff a duty to take care not to injure him or her: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests: *Odhavji Estate v. Woodhouse*, *supra* at para. 49; *Hercules Managements Ltd. v. Ernst & Young*, *supra* at para. 24. The proximity inquiry probes whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between the defendant and the plaintiff: *Syl Apps Secure Treatment Centre v. B.D.*, *supra*, at para. 26.

[83] The proximity analysis involves considering factors such as expectations, representations, reliance, and property or other interests involved: *Cooper v. Hobart*, *supra* at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* at para. 23; *Odhavji Estate v. Woodhouse*, *supra* at para. 50.

[84] Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed: *Hill v. Hamilton-Wentworth Regional Police Services Board, supra,* at para. 29. The first stage of the *Anns* test asks the normative question of whether the relationship is sufficiently close to give rise to a legal duty: *Cooper v. Hobart, supra,* at paras. 25-30. The focus of the probe is on the nature of the relationship between victim and alleged wrongdoer and the question is whether the relationship is one where the imposition of legal liability for the wrongdoer's actions would be appropriate. See *Hill v. Hamilton-Wentworth Regional Police Services Board, supra,* at para. 23.

[85] The duty of care analysis is qualified by the recognition that in recognizing a duty of care, there is a distinction between misfeasance, which is an overt act that may be foreseen to cause harm to another, and nonfeasance which is the failure to act to prevent foreseeable harm to another. In *Childs v. Desormeaux*, *supra,* Chief Justice McLachlin noted in para. 31 of her reasons that: "[W]here the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care." This qualification recognizes that action that causes harm to another and inaction that

fails to prevent harm being caused to another have different qualities of moral and legal culpability. Generally, that a person finds himself or herself in a situation of danger does not impose a duty on bystanders or observers of the situation to become involved. In para. 31, the Chief Justice stated:

> 31. ... Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant* has *directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.

[86] Moving on to the second stage of the duty of care analysis, the question to be asked is whether there exists broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the plaintiff and the defendant such that the imposition of a duty would be fair: *Cooper v. Hobart*, *supra,* at para. 37; *Odhavji Estate v. Woodhouse*, *supra* at para. 51.

[87] Applying the above legal principles to the case at bar, the first question to determine is whether the relationship between the Plaintiffs and the Diocese is within a recognized class of a duty of care to others.

[88] In the case at bar, the existence of a duty of care is based on the following allegations of material fact in the statement of claim: (a) the school was affiliated with the Diocese (para 9); (b) The Bishop of the Diocese licensed Fathers Haig and Farnsworth to act as Anglican clergy at the school (para 18); (c) after Fathers Haig and Farnsworth were ordained as Anglican Ministers, the school held itself out as an Anglican private school that would teach the Anglican faith and values (para 22); (d) the Bishop was aware at all material times that the teachings of Mother Cay and Mother Judy of the Community of Jesus were practiced at the school under the direction of Fathers Haig and Farnsworth (para 21).

[89] For the case to fit within or be analogous to a recognized category, the situation before the Court must be factually similar to those recognized in the past: *Eliopoulos v. Ontario Minister of Health & Long-Term Care* (2006) 82 O.R. (3d) 321 at para. 12 (C.A.). In my opinion, the situation before the Court does not fall within a recognized category a duty of care. The cause of action against the Diocese is built upon the premise that because the school represented itself as Anglican and because the Diocese knew that the school was promoting the practices, ideology, and culture of the Community of Jesus, which were inconsistent with Anglican values, the Diocese had a duty of care and ought to have supervised and trained Fathers Haig and Farnsworth. In other words, the alleged duty of the Diocese is the misfeasance of not using its connection or affinity with Grenville Christian College as Anglican to intervene to stop

the wrongdoing at the school. This cause of action is not within a recognized class of negligence claim.

[90] Moving on in the analysis, if the relationship does not fall within a recognized class of duty of care, then whether a duty of care to another exists involves satisfying three requirements: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeabilty and proximity.

[91] Applying the *Anns* analysis to the case at bar, in my opinion, it is not foreseeable that the Diocese would have a duty of care to the students of the school based on the circumstances that the private school conducted Anglican religious services, described itself as Anglican, and had headmasters ordained as Anglican ministers nine years after they had established the school as an independently-owned and operated school.

[92] The want of foreseeability ends the analysis, but assuming a duty of care was foreseeable, in my opinion, the second requirement, proximity, is also not satisfied. In terms of foreseeability and proximity, the relationship between the Plaintiffs and the Diocese is further removed than the relationship between the Plaintiffs and the school, which is a direct relationship. The students have an indirect relationship with the Diocese. Moreover, the relationship or connection between the school and the Diocese, upon which the indirect relationship is built, is also remote, at least legally speaking. The Diocese did not own or contract with the school. There is no employee-employer relationship between the Diocese and Fathers Haig and Farnsworth. The Diocese had no control over the school's operations. There are no corporate or organizational connections. The Diocese was not relied upon for operational advice, and no parent asked for or received advice from the Diocese about enrolling their children in the school. The Diocese had no legal right or legal duty to control or intervene in the operation of the school.

[93] The relationship or connection between the Diocese and the students is too remote fairly to impose a duty of care. As a matter of proximity, it would not be fair to impose liability on the Diocese based upon nothing more than the fact that Grenville Christian College and Fathers Haig and Farnsworth were Anglicans. From a legal perspective, assuming the Diocese had knowledge of what was happening at the school, the Diocese was a bystander that might have played the role of a good Samaritan, but it was not legally obliged to intervene in the school's affairs or to come to the rescue of students who were not its charges and with whom it had no direct relationship.

[94] The Plaintiffs submit, however, that on the facts pleaded, the issues of proximity of relationship and foreseeability are not so clear cut that the Court can conclude at this early stage that there is no prospect that the Plaintiffs will succeed at trial. I disagree, assuming that the pleaded facts are true,; it is plain and obvious that the Diocese had no legally prescribed duty of care to the students of the school. I conclude that as a matter of law, there is no reasonable cause of action in negligence against the Diocese.

[95] The legal argument for a dismissal of the action against the Diocese is stronger than the factual argument that was made in *Re: Residential Indian Schools*, [2002] A.J. No. 1265 (Q.B.), which was a case relied upon the Diocese. *Re: Residential Indian Schools* was a test case in 1,479 actions. In these cases, the plaintiffs sued the Diocese of Calgary, the Diocese of Athabasca, and the General Synod. The plaintiffs had attended Indian Residential Schools and suffered a variety of abuses. The plaintiffs alleged that the defendants were responsible for the operation and administration of the schools.

[96] The defendants in *Re: Residential Indian Schools* defended on the basis that they had no involvement with the schools that would ground any legal liability. The defendants stated that the management, operation and control of the schools were the responsibility of the Missionary Society of the Anglican Church, a distinct corporate body. On a motion for summary judgment, Justice McMahon concluded that the General Synod had no involvement in the schools at any time, and he dismissed all the claims against the General Synod. Justice McMahon also dismissed the claims against the Diocese of Calgary from 1919 to 1969, and he dismissed the claims against the Diocese of Athabasca from 1923 to 1969, because during these periods, the Dioceses were not involved in the management, operation, supervision, and staffing of the schools, which was the responsibility of the Missionary Society.

[97] In the case at bar, unlike the situation in *Re: Residential Indian Schools*, it is not the case that the Diocese was involved in the management, operation, supervision, and staffing of the schools. The most that can be said is that the Bishop of the Diocese ordained Fathers Haig and Farnsworth as Anglican ministers and Fathers Haig and Farnsworth performed Anglican services and celebrations at the school. It is plain and obvious that the pleaded claim against the Diocese, even if factual proven, does not constitute a reasonable cause of action because there is no duty of care.

[98] It is not necessary to go on to the third step of the *Anns* analysis to determine whether there are policy reasons that would negate the duty of care. There is no duty of care to negate. I, therefore, dismiss the negligence action against the Diocese.

(e) The Vicarious Liability Claim against the Diocese

[99] The Plaintiffs allege that the Diocese is vicariously liable for the misconduct of Grenville Christian College and Fathers Haig and Farnsworth. It is plain and obvious that this claim is untenable.

[100] In *K.L.B. v. British Columbia*, 2003 SCC 51, which was heard together with *M.B. v. British Columbia*, 2003 SCC 53, and *E.D.G. v. Hammer*, 2003 SCC 52, the Supreme Court of Canada considered the doctrine of vicarious liability, where a person can be found liable for the tortious conduct of others. In *K.L.B.*, the Court decided that the relationship between the Province of British Columbia and foster parents with whom the Province had placed children in need of protection was not sufficiently close to make the Province vicariously liable, although the government was liable on the basis of direct negligence.

[101] In the earlier cases of *Bazley v. Curry*, [1999] 2 S.C.R. 534, *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, the Court considered the doctrine of vicarious liability in the context of employer-employee relationships. In *K.L.B.*, the Court considered the nature of the doctrine more broadly. Chief Justice McLachlin explained at para. 18 of *K.L.B.* that vicarious liability is imposed on the theory that in some circumstances where the risks inherent in the person's enterprise materialize and cause harm, it may be fair and socially useful to hold a person responsible for the tortious conduct of others.

[102] In *Bazley v. Currie, supra,* at para. 37, Justice McLachlin, as she then was, described the policy factors underlying the imposition of vicarious liability. About imposing vicarious liability on employers, she stated:

> 37. ...the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

[103] In *K.L.B.*, the Chief Justice explained what is necessary to make out a claim for vicarious liability. She stated at para. 19 that at least two things must be demonstrated:

> 19. To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. .... Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. ... These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

[104] In the case at bar, there is no employer-employee relationship between the Diocese and the other Defendants, and the connection between the Diocese and the other Defendants is even more remote than between the defendant and the tortfeasor in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc., supra,* where the defendant successfully argued that the tortfeasor was an independent contractor rather than an employee, and hence was not sufficiently connected to the employer to ground a claim for vicarious liability. In the immediate case, the school was not acting on behalf of the Diocese. The school was an independent autonomous institution that was in operation before Fathers Haig and Farnsworth were ordained as Anglican clergy. Grenville Christian College was the enterprise of Fathers Haig and Farnsworth, and the Diocese assigned no tasks, had no power or control or legal right to intervene in the operation of the school.

[105] In the case at bar, there is no basis for a claim of direct negligence against the Diocese and it is plain and obvious that the pleadings do not disclose a relationship sufficiently close to make the imposition of vicarious liability appropriate or fair. Further, it is plain and obvious that the risks of harm from the systemic negligence allegedly committed by Grenville Christian College were not introduced or materialized

by the Diocese. It is plain and obvious as a matter of legal argument that the Plaintiffs cannot demonstrate the minimum two things necessary to base a claim for vicarious liability.

(f) The Claim against the Diocese for Breach of Fiduciary Duty

[106] The Plaintiffs advance a claim of breach of fiduciary duty against the Diocese. The elements of a claim for breach of fiduciary duty are:(1) a fiduciary relationship: (2) a fiduciary duty; and (3) breach of the fiduciary duty: *Canadian Aero Services Ltd. v. O'Malley*, [1974] S.C.R. 592 at para. 616; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Aronowicz v. Emtwo Properties Inc.* (2010), 98 O.R. (3d) 641 (C.A.).

[107] In the case at bar, the Diocese submits that it had no fiduciary relationship with the Plaintiffs.

[108] The four general characteristics of a fiduciary relationship are: (1) the fiduciary has power or a discretion to exercise; (2) the fiduciary can affect the beneficiary's legal or practical interests; (3) the beneficiary is vulnerable to the fiduciary exercise of power; and (4) the fiduciary undertakes to act with loyalty to the beneficiary: *Frame v. Smith*, [1987] 2 S.C.R. 99 at para. 60; *Alberta v. Elder Advocates of Alberta Society* [2011] 2 S.C.R. 261.

[109] In support of their claim for breach of fiduciary duty, the Plaintiffs plead the material facts set out in the preceding part of these Reasons for Decision. The Plaintiffs also plead the factually unsupported conclusions that: (a) the Diocese was required to educate the Plaintiffs in accordance with Anglican faith and values (para 26); and (b) the children who attended the school were subject to the Diocese's unilateral exercise of power or discretion (para 27). The Plaintiffs, however, plead no material facts to explain why the Diocese was required to educate students in the Anglican faith at a private school that it neither owned, operated, or controlled. The Plaintiffs plead no material facts to explain the conclusion that the Diocese had power or discretion over the students at a private school that it neither owned, operated, nor controlled. The Plaintiffs simply plead bald conclusions of law bereft of any material facts.

[110] In the case at bar, based on the material facts pleaded, the Diocese had no relationship of trust and confidence with the students. The Diocese had no power or influence over the students. The students were not vulnerable or dependent upon the Diocese. The Diocese did not have any direct contact with the students, and the Diocese did not take advantage or betray the students. The Diocese did not undertake to act with loyalty to the students.

[111] Indeed, for some students who had faith, other than Anglican, it is doubtful that there was any relationship at all between the student and the Diocese.

[112] In my opinion, in the case at bar, based on the pleadings, it is plain and obvious that there was no fiduciary relationship between the students at the school and the Diocese.

[113] I conclude that there is no reasonable cause of action for breach of fiduciary duty against the Diocese and this claim should be dismissed.

(g) Conclusion – Cause of Action Criterion

[114] For the above reasons, I conclude that the cause of action criterion is satisfied with respect to the Defendants, Grenville Christian College and Fathers Haig and Farnsworth.

[115] For the above reasons, I conclude that the cause of action criterion is not satisfied as against the Diocese. The action against the Diocese should be dismissed.

3. Identifiable Class

[116] The Plaintiffs propose the following class definition:

> Student Class: Students who attended and resided at the Grenville Christian College between September, 1973 and July 1997, excepting the children and grandchildren of the individual Defendants.

[117] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[118] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[119] In the case at bar, the Defendants raise objections to the class definition. First, they submit that the use of the modifier "resided" creates uncertainty about class membership because the staff kids sometimes resided in the dormitories and sometimes with their parents. I, however, do not see how this is a problem at all in identifying who are members of the class. Second, the Defendants submit that there are gaps in the evidence of wrongdoing over the class period. This submission is incorrect, and, in any event, it is not necessary to show an uninterrupted basis in fact of wrongdoing for the class period. Third, the Defendants submit that the common issues are so broadly stated as to prevent any analysis as to whether the class definition bears a rational relationship to the common issues. This third objection is without merit since for the reasons below, the common issues satisfy the criterion for certification.

[120] Thus, I disagree with the Defendants' challenges to the class definition. I conclude that the identifiable class criterion is satisfied.

4. Common Issues

[121] The common issues that the Plaintiffs seek to certify are:

(a) Did the Defendants owe a duty of care to the Plaintiffs' class?

(b) Did the Defendants breach the duty of care owed to the Plaintiffs?

(c) Did the Defendants owe fiduciary obligations to the Plaintiffs?

(d) Did the Defendants breach their fiduciary obligations to the Plaintiffs?

(e) Are the Corporate Defendants vicariously liable for the conduct of the individual Defendants and staff of Grenville Christian College?

(f) Does the conduct of the Defendants merit an award of punitive damages?

[122] Having regard to my conclusion that there are no causes of action as against the Diocese, the question about vicarious liability is meaningless and the remaining proposed questions are now referable only to the Defendants, Grenville Christian College and Fathers Haig and Farnsworth.

[123] For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18.

[124] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

[125] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.).

[126] An issue can satisfy the common issues requirement even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In determining the commonality of a question, the focus is on the commonality of the question, and it is an error to focus on those aspects of the claim that would require individual determination. The comparative extent of individual issues is not a consideration in the commonality inquiry although it is a factor in the preferability assessment. See *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 51-65, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[127] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), O.R. (3d) 401 (C.A.) at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. ref'd [2010] S.C.C.A. No. 348. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General) supra,* at para. 53.

[128] As noted at the outset of these Reasons, the Defendants challenge the proposed questions as lacking commonality. They make a very elaborate and vigorous argument, but the thrust of it is that the proposed questions want for commonality for two reasons; namely: (1) although having the air of substantiality, the proposed questions are in such general terms or their answers are so obvious that a trial of them would make no meaningful contribution to the advancement of a class action; and (2) the questions can be answered only by inquiry into the individual circumstances of each class member.

[129] In the absence of case law authority, I would have agreed with the Defendants that the proposed questions want for commonality, principally because, in my opinion, the resolution of the proposed common issues would not avoid duplication of fact-finding or legal analysis. In other words, assuming success at the common issues trial, when a class member moves on to his or her individual issues trial to prove causation and damages, it would appear that he or she would need and want to repeat much of the evidence and legal analysis about the systemic negligence of the school and its principals in order to succeed in proving causation and damages for his or her personal suffering at the school. But there is authority binding on me that holds that my opinion would be wrong.

[130] The Plaintiffs argue that the proposed common issues are identical to the questions that were approved by the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, the Ontario Court of Appeal in *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to SCC denied [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.), which affd [2001] O.J. No. 4163 (S.C.J.), and the Superior Court in *Slark (Litigation Guardian of) v. Ontario*, 2010 ONSC 1726 (S.C.J.), leave to appeal refd. 2010 ONSC 6131 (Div. Ct.)

[131] Thus, for the purposes of deciding the certification motion, it is not necessary to detail the Defendants' arguments because the Plaintiffs' essential counterargument is that based on the case law, I have no choice but to certify the proposed questions. I agree with the Plaintiffs' argument.

[132] The Plaintiffs submit that the Defendants' arguments have been refuted by the established case law, and, therefore, I must follow the precedents and certify the proposed questions. I agree with the Plaintiffs that I am bound by the judgments in *Rumley, Cloud* and *Slark.* Applying the principles of those cases to the circumstances of the case at bar, the conclusion is that the proposed questions, including the questions about causes of action and about punitive damages, do qualify as certifiable questions.

[133] In *Rumley v. British Columbia*, Ms. Rumley had been a student at the Jericho Hill School, a residential school for the deaf and blind operated by the Province of British Columbia. The Ombudsman investigated the school, and in a 1993 report, he concluded that sexual, physical, and emotional abuse of children was prevalent at the school throughout its history. In 1995, Thomas Berger, Q.C, the Attorney General's special counsel, issued a report that concluded that sexual abuse had been rampant at Jericho Hill School. After the report was issued, the Attorney General acknowledged that the Province was responsible for the care and well-being of the children at the school and that the Province was responsible for the abuse that had occurred there. Ms. Rumley commenced a class action on behalf of the abused children.

[134] Certification was initially denied in Ms. Rumley's proposed class action, because the motion judge concluded that there were no issues common to the class and that a class action was not the preferable procedure. In a decision that was affirmed by the Supreme Court of Canada, the British Columbia Court of Appeal reversed the motion judge. In the Court of Appeal, Mackenzie J.A. concluded that the action could be framed as a systemic negligence action and class members would not have to prove a sexual assault by a particular individual; rather, there was a common issue based on the systemic negligence of the school's failure to have in place procedures that would have prevented sexual abuse. Justice Mackenzie, however, did not certify the non-sexual abuse claims, which he regarded as peripheral to the main claim of sexual abuse at the school.

[135] The Province appealed to the Supreme Court of Canada, and Justice McLachlin wrote the judgment of the Court dismissing the appeal. In her judgment, she noted that since there was no cross-appeal of the ruling about the non-sexual abuse claims, the only issues were whether the proposed questions about sexual abuse claims were certifiable and whether a class proceeding was the preferable procedure to resolve the sexual abuse claims. In dismissing the appeal, Chief Justice McLachlin agreed with Justice Mackenzie that all class members shared an interest in the question of whether the school was systemically negligent in failing to have systems in place to prevent sexual abuse at the school, which alleged failure could be determined without reference to the circumstances of any individual class member.

[136] I agree with the Plaintiffs that *Rumley*, which was an institutional abuse case, is binding authority that the proposed questions are suitable common issues. Although in *Rumley*, only common issues referable to sexual assaults were certified and the non-sexual abuse questions were not certified, Justice Cullity's judgment in *Cloud* establishes that this factor is not a basis to distinguish *Cloud.*

[137] *Cloud v. Canada (A.G.), supra*, also is binding authority for certifying the proposed common issues in the case at bar. Mr. Cloud was a student of the Mohawk Institute Residential School, a native residential school, which was operated by Canada, the Diocese of Huron, and the New England Company. He brought a class action on behalf of students of the school. Similar to the allegations in the case at bar, Mr. Cloud claimed that the School was run in a way that was designed to create an atmosphere of fear, intimidation, and brutality. Physical discipline was frequent and excessive. He alleged that the aim of the School was to promote the assimilation of native children and

that all students suffered as a result. In addition to the physical abuse, he alleged that the students at the Mohawk Institute were: given little or no emotional support; forced to work without pay; forced to attend church and participate in other religious activities; forbidden to speak their native languages; given food of very poor quality in insufficient amounts; inadequately clothed; and provided with insufficient and inadequate recreation. Mr. Cloud alleged that all of the students at the Mohawk Institute were subjected to a sustained, systematic programme of physical, emotional, spiritual and cultural abuse.

[138] In *Cloud,* the motion judge and the majority of the Divisional Court, however, dismissed the motion for certification, among other reasons, because they concluded that there were no common issues. However, adopting Justice Cullity's dissent in the Divisional Court, which had relied heavily on the recently released Supreme Court judgment in *Rumley*, the Court of Appeal certified the action. In his dissenting judgment in the Divisional Court, Justice Cullity disagreed with the defendants' arguments that *Rumley* was distinguishable because only the sexual assault questions were certified.

[139] In the Court of Appeal, Justice Goudge, who wrote the judgment for the Court, rejected the defendants' arguments that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. Rather, he found that the claim of systemic breach of duty based on how the defendants ran the School was a part of every class member's claim and was of sufficient importance to meet the commonality requirement, which sets a low bar. Justice Goudge disagreed with the defendants' arguments that *Rumley* was distinguishable because in *Rumley* a duty to prevent sexual assaults at the School was not contested but in *Cloud* the nature of the duty was hotly contested.

[140] Justice Goudge reasoned that the existence of the systemic duty of care was a significant issue requiring resolution for each class member. In this regard, he stated at paras. 66 and 69:

> 66. I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way.
>
> 69. ... it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

[141] In determining whether the proposed common issues in the case at bar are satisfactory, I see no basis to distinguish *Cloud,* but I foreshadow to say that although the common issues criterion is satisfied by the Plaintiffs' relying only on common issues of systemic negligence, this approach will, in my opinion, present insurmountable problems to them satisfying the preferable procedure criterion. In a point that I will return to when I discuss the preferable procedure criterion, I observe here that Chief Justice McLachlin noted in *Rumley* that the approach of relying on systemic negligence to make an action certifiable was not unproblematic. At para. 30, she stated:

> 30. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

[142] *Slark (Litigation Guardian of) v. Ontario, supra,* where questions similar to those proposed for the case at bar were certified is also indistinguishable authority binding on me that supports the approval of the common issues based on systemic negligence or systemic breach of fiduciary duty.

[143] In *Slark,* the representative plaintiffs were residents of a provincially operated residential facility for individuals with developmental disabilities. The Province of Ontario was sued for negligence and breach of duty in connection with alleged mistreatment of the class members. Justice Cullity concluded that with their focus on systemic breaches, the proposed common issues had commonality.

[144] I conclude that the common issues is satisfied in the case at bar.

5. Preferable Procedure

[145] Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[146] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[147] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by

taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[148] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[149] Numerous cases have held that a class proceeding will not satisfy the requirement that it be the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at paras. 134, 135; *Williams v. Mutual Life Assurance Co.; Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. No. 1160 and 1161 (C.A.), aff'g [2001] O.J. No. 4952 (Div. Ct.), which aff'd (2000), 51 O.R. (3d) 54 (S.C.J.) and *Zicherman v. The Equitable Life Assurance Company of Canada*, [2000] O.J. No. 5144 (S.C.J.); *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.J.), aff'd [2004] O.J. No. 5309 (Div. Ct.).

[150] However, that the common issues trial may leave significant individual issues to be resolved does not necessarily mean that a class proceeding is not the preferable procedure, because it will often be the case that the common issues trial will not be determinative of the defendant's liability and the *Class Proceedings Act, 1992,* provides powerful procedural mechanisms and powerful compensation distribution mechanisms that permit the court to take a variety of approaches to resolving the claims of class members: *Cassano v. Toronto-Dominion Bank,* 2007 ONCA 781 at para. 60.

[151] In the case at bar, the Defendants submit that a class proceeding is not the preferable procedure. The Defendants do not suggest an alternative procedure, and thus it seems that the Defendants' submission is that the preferable procedure is to have the Plaintiffs' action remain as a joinder of the claims of five Plaintiffs suing Grenville Christian College, the Diocese, and Fathers Haig and Farnsworth. The other class members would be left to bring their own individual actions as the preferable procedure.

[152] In the case at bar, the Defendants submit that a class action would not promote fairness and efficiency because no efficiencies would be achieved by the resolution of the common issues and the procedure would be overwhelmed by individual proceedings. The Defendants argue that a common issues trial based on systemic negligence and systemic breaches of fiduciary duty will not carry the Class Members'

claims far, because although the Class Members may rely on the findings of systemic negligence or systemic breaches of fiduciary duty from the common issues trial, nevertheless, in order to prove causation and damages at their individual claims trials, the Class Members will have to replicate the fact-finding and legal analysis of the common issues trial.

[153] The Defendants submit that at the individual issues trials, to prove causation and quantify damages, the Plaintiffs will need to establish liability in the ordinary way. Thus, the supposed efficiencies of the common issues trial will turn out to be imagined and not real. There will be no judicial economy, and the behaviour modification will come only from the individual trials and not from the certification of the class proceeding.

[154] For the reasons they provide, I agree with the Defendants' submission that in the case at bar, the Plaintiffs' proposed class action does not satisfy the preferable procedure criterion. I also have my own reasons for coming to this conclusion.

[155] In the circumstances of the case at bar, I regard the approach of limiting the common issues to systemic wrongdoing as a device that passes the test for the common issues criterion but that fails the test for a preferable procedure. In the circumstances of this case, the technique is a penny wise, pound foolish way to secure access to justice because it will make proof of the individual members' claims more difficult. In the case at bar, the expediency of framing the claim as systemic wrongdoing would not facilitate but will impede access to justice for the individual class members, the primary goal of the *Class Proceedings Act, 1992*.

[156] These last observations bring me to the point that I foreshadowed above during the discussion of the common issues, which was that the Plaintiffs' reliance on systemic negligence and systemic breaches of fiduciary duty is problematic.

[157] In the circumstances of the case at bar, it is an understatement to say as Chief Justice *McLachlin* said in *Rumley* that the Plaintiffs' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult. In comparison to *Rumley*, the present case is an exponential increase in difficulty in proving causation for the class members' claims for compensation.

[158] For example, in the immediate case, the systemic wrongdoing involves the multifarious acts and omissions of the school adopting the practices and ideology of the Community of Jesus, and because of the Plaintiffs' choice of relying on this systemic wrongdoing, Mr. Blacklock will have to prove that his injuries were caused by the school's adoption of Mother Cay's and Mother Judy's teachings, which is a far more difficult task than proving that he was injured because Father Farnsworth beat him with a paddle or Father Farnsworth traumatized him with a light session.

[159] Moreover, beyond the fact that proving causation from the systemic wrongdoing will be challenging, meeting the challenge would, in any event, involve repeating the evidence from the common issues trial. Moreover, tactically and substantively speaking, a class member may wish to replicate the evidence to ensure that he or she obtains the

compensation that he or she deserves for the damages caused not just by the systemic wrongdoing but for all wrongs suffered.

[160] A success at the common issues trial achieves very little for class members and very little judicial economy for the administration of justice. In this last regard, it is quite conceivable that given the breadth of the alleged systemic negligence and breaches of fiduciary duty, a common issues trial would entail the proof of many factual matters that will later prove to have been a waste of time. It already appears that many class members have no grievances to pursue and others would be better served by proving individual negligence and breach of fiduciary duty claims rather than systemic wrongdoing. Further, it may be easier for each class member to prove his or her claim than it would be for the representative plaintiffs to prove systemic negligence or a systemic breach of fiduciary duty.

[161] I appreciate that the Plaintiffs rely again on *Rumley v. British Columbia*, *supra*, *Cloud v. Canada (A.G.)*, *supra,* and *Slark (Litigation Guardian of) v. Ontario*, *supra,* for the argument that there is binding authority that a class proceeding is the preferable procedure for claims of the nature of the students' claims in the case at bar.

[162] However, the analysis of the factors relevant to determining whether the preferable procedure criterion is satisfied depends upon the facts and circumstances of each case and given: the character of the systemic wrongdoing in the case at bar; the relationship to the individual issues that remain to be tried; the comparative extent of individual issues to the common issues; the anticipated complexity and manageability of both the common issues trial and the individual issues trial; the extent to which access to justice would be impeded not facilitated by the design of this action; and the matter of fairness to the Defendants, the case at bar is distinguishable from *Rumley, Cloud,* and *Slark.* A class proceeding may have been appropriate in those cases but it is not the appropriate method of advancing the students' claims in the case at bar.

[163] Moreover, in the circumstances of this case, there is a preferable procedure to a class action. In my opinion, the approach used in *Hudson v. Austin* 2010 ONSC 2789, *Oakley & Oakley Professional Corp. v. Aitken*, 2011 ONSC 5613 and *Jaikaran v. Austin*, 2011 ONSC 6336 is preferable.

[164] *Hudson v. Austin* began as a proposed class against Dr. Richard Austin, an obstetrician and gynaecologist who practiced medicine at a Toronto hospital from 1975 to 2007. In the spring of 2007, the *Toronto Star* published a series of articles that raised questions about the quality of medical care provided by Dr. Austin. As a result of the publicity, the law firm Oakley & Oakley was contacted by approximately 130 former patients with complaints about their medical treatment. Ninety of these patients retained Oakley & Oakley and with Mavis Hudson, a former patient, as the proposed representative plaintiff, the law firm commenced an action against Dr. Austin under the *Class Proceedings Act, 1992.*

[165] The *Austin* action was commenced under the Act, in part, to take advantage of s. 28 of the *Act,* which suspends the operation of the limitation period pending the determination of whether a class action is appropriate. However, appreciating the unlikeliness of satisfying the test for certification for what were in truth individual

claims of medical malpractice, and after securing my agreement to case manage all of the individual actions against Dr. Austin, Ms. Hudson was granted leave to discontinue her proposed class action.

[166] The discontinuance of the proposed class action was on terms that protected the putative class members from the resumption of the running of the limitation period for several months. The postponement of the discontinuance allowed notice to be given to the former patients so that they should commence actions if they wished to pursue individual claims against Dr. Austin. The practical effect of the discontinuance order was that former patients of Dr. Austin were provided with an opportunity to opt-in to a case-managed group of cases or what might be called a group of actions rather than a class proceeding.

[167] The end result was that 99 individual claims were brought against Dr. Austin, and I changed my assignment from managing one proposed class action to managing a group of actions under rule 37.15 of the *Rules of Civil Procedure*. The Plaintiffs in the 99 actions were represented by a team of five lawyers from Oakely & Oakley and Paul Harte Professional Corporation, which firms adopted a team approach to all of the actions. Dr. Austin defended the 99 individual actions, and he was represented by the same lawyers in all of the actions.

[168] Each of the 99 clients in the *Austin* litigation signed contingency fee agreements with *Oakley & Oakley* and each consented to an application by Oakley & Oakley pursuant to s. 28.1 (8) of the *Solicitors Act*, R.S.O. 1990, c. S.15 for permission to include in the contingency fee agreements any award of costs to the clients in their respective actions against Dr. Austin.

[169] Pleadings were completed in the 99 actions. There was documentary discovery and some examinations for discovery. Several of the cases proceeded to the stage of being set down for trial. The Plaintiffs in 19 actions then moved for summary judgment, and Dr. Austin accepted offers to settle with the result that 19 Plaintiffs obtained judgments in the fall of 2011. In addition to damage awards, the Plaintiffs were granted costs of $615,114.50, exclusive of disbursements and applicable taxes, in the aggregate for the 19 summary judgment motions.

[170] The balance of the 99 actions settled in 2012, and I approved the settlements in so far as infant settlements were involved.

[171] In my assessment, the procedure employed in the *Hudson* litigation of a group of case-managed actions with the plaintiffs being represented by one team of lawyers and the defendant represented by the same lawyer of record in all of the actions provided access to justice, judicial economy, and behaviour modification in a way that was procedurally fair.

[172] In my opinion, in the case at bar, a similar approach would be preferable to a class action that would provide a common issues trial that would involve the proof of matters that ultimately will have to be proven again or will have been a waste of time to prove in the first place and individual issues trial that will provide little or no judicial economy and make access to justice more and not less difficult.

[173] I, therefore, conclude that the preferable procedure criterion has not been satisfied.

6. Representative Plaintiff

[174] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[175] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[176] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41.

[177] I am satisfied that the Plaintiffs would be satisfactory representative plaintiffs. Notwithstanding the Defendants arguments to the contrary, none of the proposed representative plaintiffs has a conflict of interest with members of the proposed class in respect of the common issues to be certified. The claims of each of the proposed representative plaintiffs is representative of the claims of the proposed class members during the class period. Each of the Plaintiffs understands and is willing to act as a representative plaintiff in this action. The Plaintiffs have applied successfully to the Class Proceedings Fund, and accordingly, there is no issue with respect to their ability to pay an adverse cost award.

[178] The Plaintiffs have selected well-qualified, experienced, and competent Class Counsel to prosecute their claims.

[179] Assuming the preferable procedure had been satisfied, the Litigation Plan would have been satisfactory, and, in any event, ligation plans are a work in progress and can be adapted and changed during the course of the litigation.

[180] Thus, had I concluded that a class action was the preferable procedure, I would have concluded that the representative plaintiff criterion for certification would have been satisfied.

F. REFUSAL TO CERTIFY – CONTINUING ACTION IN ALTERED FORM

[181] As I indicated at the outset of these reasons, I would exercise the Court's power under sections 7, 12, and 29 (1) of the *Class Proceedings Act, 1992,* to allow the action to continue with a different litigation plan that is procedurally fair to the Defendants and that should provide the access to justice, behaviour modification, and judicial economy that are the goals of the Act.

[182] Sections 7, 12, and 29 (1) of the *Class Proceedings Act, 1992,* state:

> *Refusal to certify: proceeding may continue in altered form*
>
> 7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or notice of application; and
>
> (c) make any further order that it considers appropriate.
>
> *Court may determine conduct of proceeding*
>
> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> *Discontinuance, abandonment and settlement*
>
> 29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

[183] These provisions of the Act provide the Court with authority to make procedural orders which jurisdiction could be used to give notice to the former students that they may advance their claims against Grenville Christian College and Fathers Haig and Farnsworth by adding them as parties to the current action or by commencing individual proceedings that could be simultaneously case managed along with the action of Cavanaugh, Hale-Byrne, Van Dussen, Granger, and Blacklock.

[184] The *Austin* litigation demonstrates that an action in altered form could provide an efficient and productive procedure to litigate the claims against Grenville Christian College and Fathers Haig and Farnsworth.

[185] Therefore, I direct the Plaintiffs to prepare a new litigation plan as they may be advised. This plan may be settled at a case conference or by motion, if necessary.

[186] In the meantime, I suspend the dismissal of the certification motion for six months to allow time for the Plaintiffs to prepare a revised litigation plan and for them to give notice to the putative class members. The form of the notice may also be settled at a case conference.

[187] As was the case in the *Hudson* litigation, there would be procedural advantages to the Defendants by continuing the action in an altered form. For example, the Defendants' documentary discovery in one action could be used for all the actions and thus achieve some procedural efficiencies.

[188] It is, of course, for the Plaintiffs to reformulate the action as they may be advised, but the details can be settled at a case conference or by motion.

G. CONCLUSION

[189] For the above reasons, I dismiss the action as against the Diocese immediately and I dismiss the Plaintiffs' motion to certify the action as a class proceeding with the dismissal to take effect six months from the release of these Reasons for Decision. In the meantime, the Plaintiffs may apply for an order under s. 7 of the Act to have the action continue as one or more proceedings with additional parties.

[190] If the parties cannot resolve the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 30 days of the release of these Reasons for Decision to be followed by the Plaintiffs' submissions within a further 30 days.

[191] Order according.

Perell, J.

Released: May 23, 2012

CITATION: Cavanaugh v. Grenville Christian College, 2011 ONSC2995
COURT FILE NO.: 08-CV-347100CP
DATE: May23, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger and Tim Blacklock

Plaintiffs

- and -

Grenville Christian College, The Incorporated Synod of the Diocese of Ontario, Charles Farnsworth, Betty Farnsworth, Judy Hay the Executrix for the Estate of J. Alastair Haig, and Mary Haig.

Defendants

REASONS FOR DECISION

Perell, J.

Released: May 23, 2012